Petition

No. 81-1690

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In the Supreme Court of the United States

October Term, 1981

SAMUEL A. GERALDO,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

Whether state law that renders a telephone conversation private and that imposes both criminal and civil liabilities for an invasion of that privacy by means of a wiretap legitimates an expectation of privacy within the meaning of the Fourth and Fourteenth Amendments?

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DECISIONS BELOW

The decision of the Supreme Court of Ohio is reported as *State v. Geraldo*, 68 Ohio St. 2d 120 (1981) (A1). The decision of the Court of Appeals for the Sixth Judicial District of Ohio is unreported (A14). The decision of the Common Pleas Court of Lucas County, Ohio is unreported (A44).

JURISDICTION

The decision of the Supreme Court of Ohio of which petitioner seeks review was rendered on December 16, 1981. Circuit Justice Sandra Day O'Connor on February 8, 1982 granted an extension of time to file the petition for certiorari to March 16, 1982. The jurisdiction of this Court is conferred by 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1, Amendment XIV, Constitution of the United States:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment IV, Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Ohio Revised Code §4931.28 (in pertinent part):

> No person shall willfully and maliciously cut, break, tap, or make connection with a telegraph or telephone wire . . . .

STATEMENT OF THE CASE

On May 24, 1978, petitioner Samuel Geraldo received a telephone call from a police informer, who placed the call from the Toledo Police Department. The entire conversation between the informer and Petitioner was recorded on tape by a Toledo Police officer using a wiretapping device. It is undisputed both that the informer consented to the wiretap and that Petitioner was unaware that the conversation was recorded. It is likewise undisputed that a search warrant had not been obtained prior to the wiretapping.

Petitioner moved before trial on theft and receiving charges to suppress the tapes of his conversations with the informer. Petitioner argued that state law renders the single party consent tap illegal and that state law is one source that determines whether an expectation of privacy is legitimate for purposes of the Fourth Amendment. After a hearing on the suppression motion, the trial court held that although the single party consent wiretap in this case may not have violated federal electronic surveillance law, the tap directly violated Ohio Revised Code §4931.28. The trial court held further that the statute as well as Ohio tort law and Ohio Public Utilities Commission tariffs created a reasonable and legitimate expectation of privacy in telephone conversations requiring Fourth Amendment protection. Because the prosecution failed to bear the burden of producing evidence that exigent circumstances dispensed with the need for a warrant, the trial court suppressed the evidence.

The State immediately appealed the pretrial order suppressing the wiretap. Petitioner urged the same argument for exclusion. The Court of Appeals of Lucas County,

Ohio reversed, holding that Ohio law does not prohibit single party consent wiretaps.

Petitioner appealed to the Supreme Court of Ohio. The court held that the court of appeals erred in that Ohio law does indeed render even single party consent wiretaps illegal. Noting petitioner's constitutional argument for suppression, however, the Supreme Court held that suppression is not required because only state law had been violated and state law has no role in defining what subjective expectations of privacy are legitimate in the Fourth Amendment. *State v. Geraldo*, 68 Ohio St. 2d 120, 123-24 (1981). The Supreme Court of Ohio therefore affirmed the court of appeals' decision.

ARGUMENT

This case presents an issue of fundamental importance to the Fourth Amendment because it squarely raises a question that has been a source of confusion in search and seizure law since *Katz v. United States*, 389 U.S. 347 (1967) was first announced. *Katz* is pivotal in contemporary Fourth Amendment analysis because it changed the focus of Fourth Amendment inquiry. The focus now is on a person's expectation of privacy and whether his expectation is either legitimate, *United States v. Chadwick*, 433 U.S. 1, 7 (1977); *Nixon v. Administrator of General Services*, 433 U.S. 425, 458 (1977); *United States v. Miller*, 425 U.S. 435, 442 (1976) or reasonable, *Combs v. United States*, 408 U.S. 224, 227 (1972); *South Dakota v. Opperman*, 428 U.S. 364, 372-73 (1976).

Some of the confusion in contemporary Fourth Amendment law emanates from the fact that this Court has never provided lower courts either with guidance in identifying

what sources of law determine whether an expectation is legitimate or by articulating the essential criteria against which to measure whether an expectation is reasonable. The vagueness of the *Katz* standard in its present form has been noted and criticised. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 385 (1974). *See also* 1 W. LAFAVE, SEARCH AND SEIZURE §2.1 at 233 (1978).

An answer to the question of how courts are to decide what is "legitimate" for Fourth Amendment purposes is constitutionally pressing. Unless courts are provided with a rule of law for determining which expectations of privacy are legitimate within the meaning of *Katz*, that is, unless there is a recognized methodology for determining when Fourth Amendment protections apply, judges necessarily are left to answering this threshold Fourth Amendment issue "simply by unadorned fiat." *Rakas v. Illinois*, 439 U.S. 128, 165 (1978) (White, J., dissenting).[1] Without recognized sources of law that independently control the question of legitimacy and without standards of reasonableness the language of *Katz* is so abstract that it defies analysis and merely provides labels to be affixed to a fundamentally ruleless decision. The goal must be as stated by Lord Mansfield: "[the law] must act alike in all cases of like nature." Quoted in *Ward v. James*, [1966] 1 Q.B. 273, 294. External rules and standards must be identified so that courts and litigants will have a common method by which to measure similar and dissimilar cases.

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1. Lest there be any doubt that the *Katz* standard of legitimate expectations of privacy is not in itself sufficiently specific to provide a common standard for deciding all similar cases similarly, one need only to look to *Rakas v. Illinois*, 439 U.S. 144 n.13 (1978), where the Court highlighted the widely varying decisions that have flowed from the accepted Fourth Amendment standing concept of "legitimately on the premises."

Should the Court grant review in this case, petitioner will argue that there is a readily accessible and directly analogous methodology for identifying interests protected by the Fourth Amendment. Petitioner will contend that in order to determine whether an expectation of privacy is legitimate or reasonable as a matter of law under *Katz*, a court must analyze this threshold question in the same way that this Court has prescribed for answering the analogous threshold question in Fourteenth Amendment analysis. Since *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972), this Court has held that in order to determine whether a liberty or property interest is at stake in the first instance, one must look to *both* state and federal law to see whether either creates such an interest.

Under accepted Fourteenth Amendment analysis, the liberty interests protected by the Due Process Clause find their genesis either in federal law, as in *Ingraham v. Wright*, 430 U.S. 651 (1977) and *Meyer v. Nebraska*, 262 U.S. 390 (1923), or in state law as in *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Meachum v. Fano*, 427 U.S. 215, 226 (1976); *Montayne v. Haymes*, 427 U.S. 236, 243 (1976). Indeed, with respect to property rights, this Court has definitively held that the Due Process Clause does not establish by its own force any property rights whatsoever. Rather, in order to determine whether property rights triggering due process protection are involved one must look beyond the Fourteenth Amendment itself to sources of state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *See Goss v. Lopez*, 419 U.S. 565, 572-73 (1975). The Court in *Roth* specifically stated that the property rights protected by the Due Process Clause

> are created and their dimensions are defined by existing rules or understandings that stem from an in-

> dependent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577.

Good reason exists to look to the Fourteenth Amendment to find a methodology for identifying legitimate expectations of privacy[2] in the Fourth Amendment sense. First, the Fourteenth Amendment provides a particularly apt analogue for Fourth Amendment analysis because both amendments protect personal rights. *Cf. Griswold v. Connecticut*, 381 U.S. 479 (1965). Just as the Fourteenth Amendment protects the personal rights to property and liberty, the Fourth Amendment protects the personal right of privacy. *Warden v. Hayden*, 387 U.S. 294, 305-06 (1967). In addition, the two amendments have much the same structure, for neither amendment purports on its face to establish rights but rather prescribes the minimum constitutional procedures by which rights may be invaded.

But there is a more direct reason for linking the methodologies of the Fourth and Fourteenth Amendments than merely their analogous purposes and structures. *See* Walinski and Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy Through State Law*, 16 HARV. C.R.-C.L. L.REV. 1, 8-14 (1981). The reason is simple and compelling: the Fourth Amendment's privacy interests are themselves merely a subclass of the liberty interests protected by the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). This Court in holding

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2. That petitioner had an actual and subjective expectation of privacy in the telephone conversation was established by affidavit before the trial court, and the prosecution has conceded that point throughout. Opinion of Trial Court, A46. In any event, this Court has observed that a subjective expectation can be almost conclusively presumed in electronic surveillance cases. *United States v. White*, 401 U.S. 745, 751-52 (1971).

that the Fourth Amendment is applicable to the states through the Fourteenth said:

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause.

Id. Thus Fourteenth Amendment methodology is more than merely instructive for Fourth Amendment analysis; it is controlling because Fourth Amendment privacy is but a species of the liberties protected by the Fourteenth. Thus, should this Court grant review, petitioner will urge that because state law has a role in identifying liberties in the Fourteenth Amendment, it has a role *a fortiori* in identifying the legitimate expectations of privacy protected by the Fourth Amendment.

The predicate for such an argument exists in this case because the Supreme Court of Ohio expressly held below that there is no exception to Ohio's categorical ban against wiretapping, Ohio Revised Code §4931.28, even where the consent of one of the parties to the conversation is obtained. The court held that Ohio's "Court of Appeals erred in construing R.C. §4931.28" in a way that recognized single party consent as a means of legitimating wiretaps. *State v. Geraldo,* 68 Ohio St. 2d 120, 127-28 (1981). Not only is it a felony in Ohio to violate the total ban against wiretapping, Ohio Revised Code §4931.99, the common law of the State recognizes a private right of action in tort for invasion of the privacy in telephone conversations recognized in Ohio Revised Code §4931.28. *LeCrone v. Ohio Bell Telephone Co.,* 114 Ohio App. 299, 182 N.E.2d 15 (1961), *quoted with approval* in *LeCrone v. Ohio Bell Telephone Co.,* 120 Ohio App. 129, 201 N.E.2d 533 (1963).

Even Ohio's public utilities regulatory scheme prohibits the kind of wiretapping conducted in this case. *Ohio Bell Telephone Company General Exchange Tariff*, §20 (Order No. 75-725-TP-ATA, Feb. 27, 1976). *See State v. Geraldo*, CR. #78-7059A (Com. Pl. Lucas Co.) (A51) *rev'd on other grounds*, 68 Ohio St. 2d 120 (1981). The law of Ohio thus endorses in a variety of ways a person's privacy in telephone conversations.[3] The Supreme Court of Ohio, although recognizing that Ohio has variously endorsed a privacy interest in telephone conversations, refused to suppress the wiretap evidence because of the Ohio rule that conduct violating only state law does not require exclusion of evidence. *State v. Geraldo*, 68 Ohio St. 2d at 129. *See Cincinnati v. Alexander*, 54 Ohio St. 2d 248, 256 n.6, 375 N.E.2d 1241, 1246 n.6 (1978); *State v. Lindway*, 131 Ohio St. 166, 180, 2 N.E.2d 490, 497 (1936).

This case presents the Court with an opportunity to address several facets of Fourth Amendment law and methodology. First, should this Court accept review of this case, the Court will have squarely before it the question it expressly left open in *United States v. White*, 401 U.S. 745, 747 n.1 (1971). There this Court carefully noted that it did "not consider White's claim that the Government's actions violated state law." Neither in *White* nor elsewhere has this Court decided what role, if any, state law has

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3. Petitioner concedes that federal law does not legitimate an expectation of privacy in his telephone conversation. While Title III of the Omnibus Crime and Safe Streets Act of 1968, 18 U.S.C. §2511(1), makes it a felony for anyone to use any device to intercept a telephone conversation, a police officer who does so with the consent of one of the participants is exempted from criminal liability. Although this statute does not expressly authorize single party consent wiretaps, neither does it lend any endorsement nor in any manner reinforce an expectation of privacy. Moreover, *United States v. White*, 401 U.S. 745 (1971), held that the Fourth Amendment standing alone does not lend legitimacy. *White*, of course, did not answer what effect state law has on the issue. *Id.* at 747 n.1.

in Fourth Amendment matters. If the Court accepts this case for review, petitioner will not challenge the authority of *White*. Rather he will demonstrate that *White* does not control this case because Ohio has independently legitimated petitioner's expectation of privacy and that the reasoning of that case should not be extended to the issues presented here. *See* Walinski and Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy Through State Law*, 16 HARV. C.R.-C.L. L.REV. 1, 16 n.57 (1981).

Second, by accepting this case the Court will have the opportunity to remedy the often repeated criticism of *Katz* that it "offers neither a comprehensive test of Fourth Amendment coverage nor any positive principles by which questions of coverage can be resolved." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 385 (1974). Petitioner will urge that the Court apply in the Fourth Amendment an already well-developed system of constitutional analysis that has satisfactorily performed in Fourteenth Amendment law as measured by the comparative certainty which the methodology has brought to that Amendment's analogous threshold question.

Lastly, by accepting this case for review, the Court will have the opportunity to amplify suggestions made recently in *Smith v. Maryland*, 442 U.S. 735 (1979) and *Rakas v. Illinois*, 439 U.S. 128 (1978) that something very much like the Fourteenth Amendment methodology applies in the Fourth Amendment. In *Smith* this Court offered a significant observation about *Katz's* test of reasonable and legitimate expectation of privacy. The Court noted that even if the government were to obliterate entirely a person's subjective expectation of privacy in his home, papers and effects by announcing "on nationwide television that all homes henceforth would be subject to warrantless entry," 442 U.S. at 740 n.5, it would not necessarily follow

that the Fourth Amendment's protections would evaporate. The Court said that in such a case it would have to engage in a normative inquiry, i.e., to determine whether the search violated a core of privacy rights, protected by the Fourth Amendment regardless of statutory law or subjective expectations, that are elemental to the notion of a free society. Thus, in *Smith* the Court suggested that Fourth Amendment analysis requires something closely akin to one step in the Fourteenth Amendment's method for discovering liberty interests, i.e., a reference to federal sources that protect rights so fundamental that they cannot be abridged without invading notions that are at the very core of a free society.

In *Rakas v. Illinois*, 439 U.S. 128 (1978), the Court gave greater detail to an analogy with Fourteenth Amendment methodology. The Court there intimated this course of analysis when it said that:

> [A] "legitimate" expectation of privacy by definition means more than a subjective expectation of not being discovered. . . . [I]t would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary rule issues in criminal cases. *Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law* or to understandings that are recognized and permitted by society. . . .

439 U.S. at 143-44 n.12 (emphasis added). This reasoning sounds strikingly similar to the *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Wolff v. McDonnell*, 418 U.S. 539 (1974) lines of cases which pegged Fourteenth Amendment protection in part upon state and common law de-

finitions of property and liberty. Thus, this Court has already begun, albeit fragmentally, to amplify the *Katz* standard in precisely the way the Supreme Court of Ohio rejected.

CONCLUSION

This case involving warrantless seizure of a telephone conversation presents perhaps a uniquely appropriate vehicle for explaining *Katz* and for testing the methodology vaguely suggested in *Smith* and *Rakas*. *See* Walinski and Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy Through State Law*, 16 HARV. C.R.-C.L. L.REV. 1, 14-15, 19 (1981). Federal law concededly does not legitimate the privacy interest asserted here. State law, however, does, but it does not prohibit the use of evidence where police obtained it by violating only state law. Thus, this case turns entirely on the question of whether state law has a role in the Fourth Amendment similar to its recognized role in the Fourteenth. An answer to this issue along the lines already suggested in *Smith* and *Rakas* will reduce uncertainty in the application of the Fourth Amendment.

Respectfully submitted,

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Appendix

APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided December 16, 1981)

No. 80-1677

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO,
Appellee,
vs.
SAMUEL GERALDO,
Appellant.

Neither the federal constitution nor state law requires the suppression of evidence obtained by the warrantless recording of a telephone conversation between a consenting police informant and a non-consenting defendant. (*United States v. White* (1971), 401 U.S. 745, followed.)

APPEAL FROM THE COURT OF APPEALS FOR LUCAS COUNTY.

The facts in this appeal are uncontroverted. On May 24, 1978, appellant, Samuel Geraldo, received a phone call from one Hugh Thom, who was acting as a police

informant. Thom had been arrested in connection with the theft of tractor trailers during the month of May. He made a statement implicating appellant and certain other individuals. The police sergeant who took the statement doubted Thom, whereupon, Thom offered to verify his story by calling appellant. Thom, in the presence of the sergeant, then phoned appellant. The entire conversation was tape recorded by an audio pickup device that the sergeant had attached to the phone used by Thom. It is undisputed that Thom voluntarily consented to the recording of the conversation, that appellant was unaware of the recording, and that the sergeant had not obtained a search warrant prior to the recording.

In November 1978, the Lucas County Grand Jury returned a multiple count indictment against appellant, charging him, *inter alia*, with engaging in organized crime, in violation of R. C. 2923.04(A)(5), four counts of grand theft, in violation of R. C. 2913.02(A), and three counts of receiving stolen property, in violation of R. C. 2913.51.

On April 23, 1979, appellant filed a "[m]otion to suppress statements secured through electronic surveillance." A hearing was held on the motion to suppress in the Court of Common Pleas of Lucas County, and after oral arguments and the submission of briefs, the court granted appellant's motion to suppress. The suppression order forbade the introduction of the tapes of the conversation and further prohibited any testimony by Thom and the detective regarding the contents of the Thom-Geraldo communication.

The state appealed this ruling to the Court of Appeals, which reversed the trial court in a split decision. The majority below held that "[i]n the absence of explicit state law or a constitutional provision, we find that there is no requirement that police obtain a warrant before

police can record or transmit a conversation between a criminal defendant and a police agent." Judge Connors in a lengthy concurring and dissenting opinion took the position that "[u]nder the circumstances of this case and in most consent surveillance cases, the Art. I §14 rights of the citizens must be protected by the acquisition of a search warrant prior to the seizure of oral communications" and would have upheld the suppression of the tape recordings. Judge Connors agreed with the majority that the trial court erred in suppressing Thom's testimony based on his independent recollection of the contents of his conversation with appellant.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

* * * * *

SWEENEY, *J.* The question presented in the instant appeal is whether the federal constitution or state law requires the suppression of evidence obtained by the warrantless recording of a telephone conversation between a consenting police informant and a non-consenting defendant.

I.

Appellant seeks to avoid the rule expressed in the plurality opinion of the United States Supreme Court in *United States v. White* (1971), 401 U. S. 745, and subsequently ratified by a majority of that court in *United States v. Caceres* (1979), 440 U. S. 741, by advancing a theory which posits that the scope of Fourth Amendment rights is to be ascertained with reference to state law.[1]

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1. The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

(Continued on following page)

In *White*, which followed the seminal wiretaping [sic] case of *Katz v. United States* (1967), 389 U. S. 347, Justice White, writing for three other members of the court, stated the following, at pages 751-752:

"Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. *Hoffa v. United States*, 385 U. S., at 300-303. For constitutional purposes, no different result is required if the agent, instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, *Lopez v. United States, supra,* [(1963), 373 U. S. 427], (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. *On Lee v. United States, supra* [(1952), 343 U. S. 747]. If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

"Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on

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Footnote continued—

shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

the discretion of their companions. Very probably, individual defendants neither know nor suspect that their colleagues have gone or will go to the police or are carrying recorders or transmitters. Otherwise, conversation would cease and our problem with these encounters would be nonexistent or far different from those now before us. Our problem, * * * is what expectations of privacy are constitutionally 'justifiable'—what expectations the Fourth Amendment will protect in the absence of a warrant. So far, the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants in the manner exemplified by *Hoffa* and * * * [*Lewis v. United States* (1966), 385 U. S. 206]. If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case. See *Lopez v. United States,* 373 U. S. 427 (1963)."[2]

Notwithstanding *White* and the clear statement in *United States v. Careres* [sic], *supra,* at page 744, that "[n]either the Constitution nor any Act of Congress requires that official approval be secured before conversations are overheard or recorded by Government agents with the

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2. Justice White, at page 753, also noted the probative value of such recorded evidence:

"* * * An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent. It may also be that with the recording in existence it is less likely that the informant will change his mind, less chance that threat or injury will suppress unfavorable evidence and less chance that cross-examination will confound the testimony."

consent of one of the conversants,"[3] appellant contends that "[w]here a person has a subjective expectation of privacy in an area that the state has rendered private as a matter of state law, the person has a reasonable and legitimate expectation of privacy entitled to Fourth Amendment protection."

The essence of appellant's argument is that inasmuch as the privacy rights guaranteed by the Fourth Amendment are but a subset of those liberty interests protected by the Due Process Clause of the Fourteenth Amendment, it is entirely appropriate, and indeed necessary, for a court to look to state law to determine the scope of constitutionally protected Fourth Amendment interests in precisely the same way courts refer to state law to assess claims alleging that protected interests have been abridged in violation of the Fourteenth Amendment. See, *e.g., Bd. of Regents v. Roth* (1972), 408 U. S. 564. Moreover, according to appellant, the court in fn. 1 of *White* left open the question of whether state law can create reasonable expectations of privacy entitled to constitutional protection.[4] The footnote states, at page 747, in relevant part: "* * * [W]e do not consider White's claim that the Government's actions violated state law."

The above language provides the underpinning for appellant's elaborate Fourth Amendment theory and, necessarily, he ascribes to it great significance. As we read it, however, fn. 1 in *White* merely stands for the oft-stated

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3. Federal legislation, namely, Title III of the Omnibus Crime and Safe Streets Act of 1968, and more specifically, Section 2511(2)(c), Title 18, U. S. Code, permits a police officer to intercept a telephone conversation if one of the participants consents thereto.

4. For a more complete explication of appellant's theory, see Walinski & Tucker, Expectations of Privacy: Fourth Amendment Legitimacy through State Law, 16 Harv. Civ. Rts. Civ. Lib. L. Rev. 1.

proposition that "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." (Emphasis in original.) *Oregon v. Hass* (1975), 420 U. S. 714, at page 719. See, generally, Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489. We glean no intent on the part of the United States Supreme Court in *White* to constitutionalize state law in order to determine what is reasonable for purposes of the Fourth Amendment. Thus, as a matter of federal constitutional law, after the decision in *White* it is irrelevant that the police conduct in the instant case may not have comported with R. C. 4931.28 (wiretapping prohibited), or Ohio Bell Telephone Company Exchange Tariff Section 20, Order No. 75-725-TP-ATA (1976) (beeper required when recording), which comprise the specific state law bases upon which appellant relies, so long as the warrantless recording of the telephone conversation was undertaken with the voluntary consent of one of the participants thereto. We hold, on the authority of *White*, that the warrantless recording of a telephone conversation between a consenting police informant and a non-consenting defendant does not offend the Fourth Amendment to the United States Constitution.

II.

We now consider whether state law, be it constitutional, statutory, or administrative, requires the suppression of the evidence obtained by the warrantless recording the Geraldo-Thom telephone conversation.

II A.

Section 14, Article I, of the Ohio Constitution, which is virtually identical to the Fourth Amendment to the

federal constitution, provides that "[t]he right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

The question is whether this court should imbue the state constitutional provisions regarding search and seizure with a more stringent standard of reasonableness than is required by the cognate federal constitutional provisions. Although "a State is free *as a matter of its own law* to impose greater restrictions on police activity than * * * [the United States Supreme Court] holds to be necessary upon federal constitutional standards," (emphasis in original) *Oregon v. Hass, supra,* we are disinclined to impose greater restrictions in the absence of explicit state constitutional guarantees protecting against invasions of privacy that clearly transcend the Fourth Amendment.[5] The Court

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5. The Michigan Supreme Court, for example, interpreted Section 11, Article I, of the Michigan Constitution, which, like Section 14, Article I, of the Ohio Constitution, follows the language of the Fourth Amendment almost verbatim, to require a warrant when a consenting participant transmits a conversation electronically to a third party. *People v. Beavers* (1975), 393 Mich. 554, 227 N.W. 2d 511. The Michigan court, at page 565, stated it was "persuaded by the logic of Justice Harlan," who dissented in *White.* Justice Harlan's dissent expressed this view at 401 U. S., pages 787-789:

"The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society. It goes beyond the impact on privacy occasioned by the ordinary type of 'informer' investigation upheld in *Lewis* and *Hoffa.* The argument of the plurality opinion, to the effect that it is irrelevant whether secrets are revealed by the mere tattletale or the transistor, ignores the differences occasioned by third-party monitoring and recording which insures full and accurate dis-

(Continued on following page)

of Appeals noted that "[t]wo states have found that a warrant requirement does exist based upon explicit provisions in their state constitutions which guarantee state citizens the right to privacy." See *State v. Brackman* (Mont. 1978), 582 P. 2d 1216; *State v. Glass* (Alaska, 1978), 583 P. 2d 872. The court below went on to state, however, that "Ohio's constitution contains no such [privacy] provision." It is our opinion that the reach of Section 14, Article I, of the Ohio Constitution with respect to the warrantless monitoring of a consenting informant's

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Footnote continued—

closure of all that is said, free of the possibility of error and oversight that inheres in human reporting.

"Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life. Much offhand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant."

We are sensitive to Justice Harlan's concerns as set forth above. Moreover, we recognize, as did the Michigan court in *Beavers*, at page 563, that "* * * [w]ith the advent of increasingly sophisticated electronic surveillance equipment, the evolving body of law which seeks to reconcile the need for effective police investigating practices in combatting criminal activity with the ominous spectre of the Orwellian Big Brother is fraught with complexities."

Nevertheless, while we acknowledge the legitimacy of the misgivings expressed by Justice Harland in *White* and the Michigan court in *Beavers*, as well as the general desirability of securing a warrant, we adhere to the rule expressed in *White*, at page 752, that "[i]f the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when the same agent has recorded or transmitted the conversation which are later offered in evidence to prove the State's case."

telephone conversation is coextensive with that of the Fourth Amendment to the United States Constitution. As a consequence thereof, appellant's failure to prove a violation of the Fourth Amendment dictates the conclusion that his rights under Section 14, Article I, of the Ohio Constitution have not been violated either.

With respect to Ohio statutory law, appellant argues that "Ohio Revised Code §4931.28 expressly and categorically prohibits telephone wiretapping." R. C. 4931.28 provides:

"No person shall willfully and maliciously cut, break, tap, or make connection with a telegraph or telephone wire or read or copy in an unauthorized manner, a telegraphic message or communication from or upon a telegraph or telephone line, wire, or cable, so cut or tapped, or make unauthorized use thereof, or willfully and maliciously prevent, obstruct, or delay the sending, conveyance, or delivery of an authorized telegraphic message or communication by or through a line, cable, or wire, under the control of a telegraph or telephone company."[6]

The Court of Appeals majority did not find a violation of R. C. 4931.28 because, in its view, "the Ohio legislature meant for R. C. 4931.28 to be read *in pari materia* with the consent provision of R. C. 2933.58." R. C. 2933.58 provides:

"(A) Except as provided in this section, or as permitted under the laws of the United States, no person shall willfully, surreptitiously, and by means of any device listen to, transmit, amplify, or record a private oral com-

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6. R. C. 4931.99(E) provides:

"Whoever violates section 4931.28 of the Revised Code shall be fined not less than fifty nor more than one thousand dollars or imprisoned not less than one nor more than three years or both."

munication carried on in circumstances which reasonably indicate that the parties thereto desire it to be confined to them, and no person shall willfully disclose or willfully use or attempt to use any information, knowing or having reasonable cause to believe such information was obtained in violation of this section.

"Whoever violates this section shall be fined not more than one thousand dollars or imprisoned not less than one nor more than three years, or both.

"(B) *This section does not apply to communications by or through a line, cable, or wire under the control of a telegraph or telephone company,* or to communications in which at least one party thereto, in order to prevent a crime or bring an offender to justice, has consented in advance to such communications being listened to, transmitted, amplified, or recorded, or to communications carried on publicly or under circumstances in which the parties thereto might reasonably expect such communications to be listened to, transmitted, amplified, or recorded." (Emphasis added.)

The Court of Appeals erred in construing R. C. 4931.28 *in pari materia* with R. C. 2933.58 because R. C. 2933.58, by its own terms, "does not apply to communications by or through a line * * * under the control of a * * * telephone company" irrespective of any consent obtained pursuant to R. C. 2933.58(A).

Appellant makes much of the fact that the General Assembly has twice rejected amendments to R. C. 4931.28 that would have added a consent exception, analogous to the consent exception contained in R. C. 2933.58.[7] Judge Connors, dissenting below, was of the opinion that the

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7. See, H. B. No. 956, 108th General Assembly; H. B. No. 1279, 112th General Assembly.

General Assembly's refusal to enact the proposed amendments to R. C. 4931.28 "is at least some indication that the state intended greater protection for its citizens under state law than the federal government does under federal law." This may well be the case. Even if we assume, however, that the actions of Thom and the sergeant fell afoul of those authorized under R. C. 4931.28, the question remains whether this statutory violation provides a sufficient basis to invoke the exclusionary rule and to suppress the controverted recordings.

It is clear that the General Assembly chose not to enact a consent exception to R. C. 4931.28. It is also clear that the General Assembly chose not to enact a statutory exclusionary rule that would come into play when evidence is obtained in violation of R. C. 4931.28. Several states have enacted statutes governing the use of electronic surveillance that incorporate explicit provisions limiting or prohibiting the use of evidence obtained in contravention of the electronic surveillance laws.[8] For cases interpreting these statutes, see, *e.g., State v. Wanrow* (1977), 88 Wash. 2d 221, 559 P. 2d 548; *State v. Ayres* (1978), 118 N.H. 90, 383 A. 2d 87; *State, ex rel. Arnold v. County Court of Rock County* (1971), 51 Wis. 2d 434, 187 N.W. 2d 354. As the Court of Appeals stated, however, "Ohio has no such explicit state statutes which govern electronic surveillance."

Moreover, notwithstanding the fact that a violation of R. C. 4931.28 may give rise to criminal penalties or as one Court of Appeals has ruled, a private action in tort, see *LeCrone v. Ohio Bell Tel. Co.* (1961), 114 Ohio App. 299, ap-

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8. These statutes are collected in Fishman, Wiretapping and Eavesdropping, Section 8, and accompanying notes at pages 13-15, and in Cum. Supp. at pages 23-24. See, also, Carr, The Law of Electronic Surveillance, Section 3.05[3], at pages 93-94, and Supp. at pages 21-22.

proved in *LeCrone v. Ohio Bell Tel. Co.* (1963), 120 Ohio App. 129, the rule in this state is that "* * * the exclusionary rule will not ordinarily be applied to evidence which is the product of police conduct violative of state law but not violative of constitutional rights." *Kettering v. Hollen* (1980), 64 Ohio St. 2d 232, 235. See also, *State v. Unger* (1981), 67 Ohio St. 2d 65, 70. We see no reason to depart from the aforestated rule and, accordingly, we refuse to constitutionalize R. C. 4931.28. Nor, under the guise of construing the statute, do we choose to write into R. C. 4931.28 a provision excluding probative evidence obtained in violation thereof.

Our discussion regarding the effect of a statutory violation on the admissibility of evidence applies *a fortiori* to appellant's contentions respecting the alleged breach of Ohio Bell Telephone Company General Exchange Tariff, Section 20, Order No. 75-725-TP-ATA, which requires in subsection II B 3 a, "a distinctive signal that is repeated at intervals of approximately fifteen seconds when the recording equipment is in use." In short, the telephone tariff creates no constitutional right to a "beep tone."

For the reasons hereinbefore stated, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

CELEBREZZE, C.J., W. BROWN, LOCHER, HOLMES, C. BROWN and KRUPANSKY, JJ., concur.

OPINION OF THE COURT OF APPEALS OF LUCAS COUNTY, OHIO

(Decided October 3, 1980)

C.A. No. L-79-303

IN THE COURT OF APPEALS OF LUCAS COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellant,

v.

SAMUEL GERALDO,
Defendant-Appellee.

OPINION

WILEY, *J.* This appeal is from the granting by the Lucas County Court of Common Pleas of defendant-appellee Samuel Geraldo's motion to suppress statements secured through electronic surveillance. The state of Ohio then took this appeal pursuant to R.C. 2945.67 and Crim. R. 12(J).

On May 24, 1978, Hugh Thom was arrested by the Toledo Police Department on grand theft charges involving the theft of four tractor-trailers. In a statement given to Police Detective Robert Baumgartner at police headquarters, Thom implicated various individuals in the theft of these trailers, including the defendant Samuel Geraldo. When Detective Baumgartner indicated he did not believe Thom, Thom offered to call, and did call, the defendant and the others. With the consent of Thom, Detective Baumgartner placed a recording device on the phone to

make a tape recording of these conversations. The record of the suppression hearing indicates that Thom's consent to the recordings was voluntarily given. Detective Baumgartner did not obtain a warrant to make these recordings.

Prior to trial defendant moved to suppress the contents of his May 24, 1978, telephone conversation with Thom. The defendant in making this motion alleged that the recording of his May 24, 1978, telephone conversation with Thom, without the police first obtaining a warrant, was in violation of defendant's Fourth and Ninth Amendment rights under the Federal Constitution made applicable to Ohio through the due process clause of the Fourteenth Amendment and Article I §14 and §20 of the Ohio Constitution.

The trial judge granted this motion based upon the judge's interpretation of Ohio statutory law and upon a portion of Ohio Bell's general exchange tariff which requires a beeper tone sounding at 15 second intervals when any conversation is recorded. The court stated:

> "In light of the foregoing, the Court finds that the privacy expectation asserted by the defendant is reasonable and legitimate under the law of Ohio. Therefore it is the Court's opinion that the recording of the May 24, 1978 Thom-Geraldo telephone conversation was a search within the meaning of the Fourth Amendment of the United States Constitution. Thus, the question presented is whether the fruits of this search are admissible at trial or whether they must be excluded."

The trial court then ordered that neither Detective Baumgartner nor Hugh Thom could testify at trial about the contents of Thom's May 24, 1978, call with the defendant,

nor could the tape of this conversation be played. The court did not indicate that the contents of this call could be used for impeachment purposes if the defendant testified.

Appellant's first and second assignments of error are:

"THE TRIAL COURT ERRED IN SUPPRESSING TAPE RECORDINGS OF A TELEPHONE CONVERSATION BETWEEN APPELLEE AND HUGH THOM, A STATE'S INFORMANT.

"THE TRIAL COURT ERRED IN SUPPRESSING ALL TESTIMONY CONCERNING THE CONTENTS OF THE MAY 24, 1978 CONVERSATIONS BETWEEN APPELLEE AND HUGH THOM, THE STATE'S INFORMANT."

Neither party disputes that under federal constitutional law there would be no warrant requirement in the case sub judice before the police could record Thom's conversation with the defendant. In the case of *United States v. White* (1971), 401 U.S. 745, the United States Supreme Court, in a plurality opinion, refused to require a warrant before a police agent uses a recorder or transmitter in a conversation with a criminal suspect. The court had previously held that an agent who acts without such devices needs no warrant. The court stated:

"It is thus untenable to consider the activities and reports of the police agent himself, though acting without a warrant, to be a 'reasonable' investigative effort and lawful under the Fourth Amendment but to view the same agent with a recorder or transmitter as conducting an 'unreasonable' and unconstitutional search and seizure. Our opinion is currently shared by Congress and the Executive Branch, Title III, Omnibus Crime Control and Safe Street Act of 1968, 82 Stat. 212,

18 U.S.C. § 2510 et seq. (1964 ed., Supp. V), and the American Bar Association. Project on Standards for Criminal Justice, Electronic Surveillance § 4.1 (Approved Draft 1971). It is also the result reached by prior cases in this Court. On *Lee, supra; Lopez v. United States, supra.*" *United States v. White, supra,* at 753.

As is indicated in *United States v. White, supra,* federal statutes impose no warrant requirement upon the recording of a conversation with a criminal suspect by a police agent. Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. § 2510 et seq. Therefore, there is no federal constitutional right and no federal statutory requirement that a warrant be secured before a criminal suspect's conversation with a police agent can be recorded or transmitted.

State courts may adopt greater restrictions on police activity than those provided by the federal constitution based upon the state court's interpretation of the state constitution or state law. *Oregon v. Hass* (1975), 420 U.S. 714. Two states have found that a warrant requirement does exist based upon explicit provisions in their state constitutions which guarantee state citizens the right to privacy. See *State v. Brackman* (Sp. Ct. Mont. 1978), 582 P. 2d 1216; *State v. Glass* (Sp. Ct. Alaska 1978), 583 P. 2d 872. Ohio's constitution contains no such provision.

Other states have found the need for such a warrant based upon judicial interpretation of explicit state statutes governing the use of electronic surveillance. See *State v. Wanrow* (1978), 88 Wash. 2d 221, 559 P. 2d 548; *State v. Ayres* (1978), 118 N.H. 90, 383 A. 2d 87; *State, ex rel. Arnold v. County Court of Rock County* (1971), 51 Wis. 2d 434; 187 N.W. 2d 354. Ohio has no such explicit state statutes which govern electronic surveillance.

There are, however, two statutory sections which are relevant here, to wit: R.C. 4931.28 and R.C. 2933.58. R.C. 2933.58 provides:

> "(A) Except as provided in this section, or as permitted under the laws of the United States, no person shall willfully, surreptitiously, and by means of any device listen to, transmit, amplify, or record a private oral communication carried on in circumstances which reasonably indicate that the parties thereto desire it to be confined to them and no person shall willfully disclose or willfully use or attempt to use any information, knowing or having reasonable cause to believe such information was obtained in violation of this section.
>
> "Whoever violates this section shall be fined not more than one thousand dollars or imprisoned not less than one nor more than three years, or both.
>
> "(B) This section does not apply to communications by or through a line, cable, or wire under the control of a telegraph or telephone company, or to communications in which at least one party thereto, in order to prevent a crime or bring an offender to justice, has consented in advance to such communications being listened to, transmitted, amplified, or recorded, or to communications carried on publicly or under circumstances in which the parties thereto might reasonably expect such communications to be listened to, transmitted, amplified, or recorded."

Under the exceptions set forth in R.C. 2933.58(B), the May 24th conversation of Thom with the defendant would not be subject to the criminal penalties of R.C. 2933.58(A) because Thom had consented to the conversation being recorded as a means of bringing the defendant to justice.

We note that R.C. 2933.58(B) excludes telephone conversations from the provisions of R.C. 2933.58(A). R.C. 4931.28 provides:

> "No person shall willfully and maliciously cut, break, tape, or make connection with a telegraph or telephone wire or read or copy in an unauthorized manner, a telegraphic message or communication from or upon a telegraph or telephone line, wire, or cable, so cut or tapped, or make unauthorized use thereof, or willfully and maliciously prevent, obstruct, or delay the sending, conveyance, or delivery of an authorized telegraphic message or communication by or through a line, cable, or wire, under the control of a telegraph or telephone company."

We find that the Ohio legislature meant for R.C. 4931.28 to be read in pari materia with the consent provision of R.C. 2933.58. Therefore, there was no violation of R.C. 4931.28 in Detective Baumgartner's recording Thom's May 24th conversation with the defendant.

In addition, we question whether R.C. 4931.28 is even applicable to Detective Baumgartner's actions of recording Thom's conversation with the defendant. R.C. 4931.28 provides "No person shall copy in an unauthorized manner, * * * communication for or upon a * * * telephone line." Neither R.C. 4931.28, nor any other Ohio statute or the Ohio Constitution require a warrant to record a conversation between a criminal defendant and a police agent, by or with the consent of a police agent and without the knowledge of the criminal defendant. We determine Detective Baumgartner's actions in recording the conversation of Thom and the defendant were not taken in an unauthorized manner.

We note with interest the discussion in the appellee's brief of the legislative history of both R.C. 2933.58 and

4931.28. We will not speculate on the intent of the legislature in its failure to adopt comprehensive state statutes related to electronic surveillance. In the absence of explicit state law or a state constitutional provision, we find that there is no requirement that police obtain a warrant before police can record or transmit a conversation between a criminal defendant and a police agent. The United States Supreme Court's decision in *United States v. White, supra,* is controlling here, and we find the trial court should not have suppressed the tape of the May 24th conversation of Thom with the defendant nor prohibited Thom or Detective Baumgartner from testifying about this conversation, except for impeachment purposes.

We disagree with the trial court that Ohio Bell's General Exchange Tariff which requires a beeper to sound at 15 second intervals when recording equipment is used on a telephone is relevant here. As was stated in the case of *United States v. Rich* (8th Cir. 1975), 518 F. 2d 980.

> "The defendants' remaining contention that the monitoring in question violated state and federal tariff regulations because no bleeper device was attached to the telephone is frivolous as those tariffs on their face supply only to persons acting in their private capacities." *United States v. Rich, supra,* at 985.

We find both of appellant's assignments of error well taken.

On consideration whereof, the court finds substantial justice has not been done the party complaining, and judgment of the Lucas County Court of Common Pleas is reversed. This cause is remanded to said court for further proceedings. Costs assessed against appellee.

JUDGMENT REVERSED

POTTER, *P.J.*, concurs. CONNORS, *J.*, dissents in part and concurs in part.

CONNORS, *J.*, dissents in part and concurs in part. This cause comes upon appeal from the granting of defendant's motion to suppress certain telephone conversations had between the defendant and an informant of the state. On or about May 24, 1978, the defendant, Samuel Geraldo, received a telephone call from Hugh Thom, an informant for the state. The telephone conversation was placed in the office of and in the presence of Detective Sgt. Baumgartner of the Toledo Police Department. This telephone conversation was tape-recorded by an audio-pickup, suction cupped to the receiver of the phone used by Thom. It is undisputed that Hugh Thom consented to the tap. It is also undisputed that no warrant was obtained at the time, although ample opportunity existed for the police to obtain one. The record reveals that defendant-appellee did not consent to the tape recording of the conversation.

The defendant moved to suppress the contents of the above-mentioned telephone conversation on the ground that the interception and recording thereof was an unreasonable search and seizure in violation of the Fourth Amendment of the United States Constitution. The trial court granted defendant's motion to suppress and found that, "the recording of the May 24, 1978 Geraldo-Thom telephone conversation constituted an unreasonable search and seizure in violation of the Fourth Amendment of the United States Constitution." I agree.

The trial court ordered that any and all tape recordings or other reproductions of that conversation not be admitted into evidence at trial. The order, however, specifically would permit the introduction of recollections of the contents of the telephone conversation for purposes of impeaching the testimony of defendant Geraldo. From the granting of defendant's motion, the state appeals.

The appellant assigns as its first assignment of error:

"The trial court improperly extended the Fourth Amendment of the United States Constitution so as to require suppression of the tape recording of the subject phone conversation."

I would affirm the trial court's judgment, but on other grounds as to assignment of error one.

This dissent's decisional basis rests solely on the power of a state to afford greater protection to its citizens under its own laws and constitution, than the federal government guarantees to them under federal laws and the United States Constitution. As was stated by the United States Supreme Court in *Oregon v. Hass* (1974), 420 U.S. at 719, "a state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitution standards."[1] (Emphasis added). This decision must necessarily revert then to an examination of both the statutory and constitutional law of this state.

The statutes governing the use of wiretaps in the state of Ohio are R.C. 2933.58 and 4931.28. Section (A) of 2933.58 establishes as a crime the willful and surreptitious listening, transmitting, amplifying or recording of a private oral communication carried on in circumstances which reasonably indicate that the parties thereto desire it to be

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1. Mr. Justice Brennan states in his law review article, "State Constitutions and the Protection of Individual Rights" 90 Harvard Law Review 489 at 491 that:

"* * * state courts cannot rest when they have afforded their citizens the full protection of the federal constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."

confined to them, except as provided for in this section, or as permitted under the laws of the United States. Section (B) forecloses the applicability of R.C. 2933.58 to the case sub judice by stating:

> "This section does not apply to communications by or through a line, cable or wire under the control of a telegraph or telephone company * * *"

R.C. 4931.28 does not contain a consent exception to wiretaps and prohibits the willful and malicious cutting, tapping, breaking or connecting with a telegraph or telephone wire or reading or copying in an unauthorized manner a telegraphic message or communication from or upon a telegraph or telephone line, wire or cable * * *." R.C. 4931.28 can be read as an absolute prohibition of wiretaps on telegraph or telephone lines under the control of a telephone company.

The Ohio State Legislature had the opportunity to amend R.C. 4931.28 to allow for consensual wiretapping; it rejected the bill.[2] Had the state legislature wanted to

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2. The bill referred to is H.B. No. 956 introduced in the 108th General Assembly 1969-70. The bill was intended to amend Sections 1701.91 and 4931.28, to enact new Sections 109.51 to 109.57, inclusive, 109.86, 109.87, 2701.10, and 2933.51 to 2933.58, inclusive, and to repeal Sections 109.51 to 109.63, inclusive, of the Revised Code, to provide for effective crime prevention and law enforcement.

The Bill would have added section (B) which states:

> "This section does not apply to activities conducted pursuant to Sections 2933.51 to 2933.54, inclusive, of the Revised Code, or pursuant to the laws of the United States, or conducted in connection with a wiretap or eavesdrop to listen to, transmit, amplify, or record communications in which at least one of the parties thereto or the subscriber of the line to be tapped has consented in advance to such wiretap or eavesdrop, in order to prevent a crime or bring an offender to justice. This section does not prohibit or render unlawful the activities of an officer, agent, or employee of a telegraph or telephone company carried on in the course of his employment for the purpose of or incidental to constructing, maintaining, conducting, repairing, or operating the company's services, facilities, or equipment."

follow the federal lead[3] in allowing consensual wiretapping, it would have adopted the proposed amended parts of 4931.28, giving its citizens less protection from police activity. It chose not to act—this is at least some indication that the state intended greater protection for its citizens under state law than the federal government does under federal law.

Looking then to federal constitutional law, the "lodestar" for any wiretap case must be *Katz v. United States* (1967), 389 U.S. 347. *Katz* promulgated a two-prong test to determine when the seizure of oral communications violated the Fourth Amendment and thus become an unreasonable search and seizure. First, did the party who claims a Fourth Amendment violation have an actual and subjective expectation of privacy, and second, is that expectation of privacy legitimate or reasonable as a matter of law. *Smith v. Maryland* (1979), 442 U.S. 735.

The state in the case sub judice conceded in their brief at page 3 that, "Mr. Geraldo had an expectation that his conversation with Thom would not be revealed to law enforcement officials," for "he is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Katz, supra,* at 352.

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3. The Federal lead is the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. §2510 et seq. at §2511(2)(D) states that:

> "It shall not be unlawful under this chapter [18 U.S.C. §2510 et seq.] for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is interrupted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State for the purpose of committing any other injurious act."

The state, however, contends that this expectation of privacy is not one that society would recognize under the circumstances. I do not agree.

As a matter of law, the Ohio statutory Sections 2933.58 and 4931.28 do not contain consent exceptions. The Ohio Legislature has rejected the most recent attempt to include such an exception. But language in both *State v. Ferrell* (1976), 2 O.O. 3d 57 at 58 and *United States v. White* (1971), 401 U.S. 745 at 752, establish the constitutionality of a surreptitious seizure of voluntary words when made to a police informant. As noted in *Ferrell, supra,* at page 58:

> "One does not have a constitutional right to be protected from the effect of his own statements, voluntarily made, even though those statements are made to an informant who is fully cooperating with the police. * * *"

The facts in *Ferrell, supra,* are distinguishable, as will be noted later herein.

"Although the constitutionality of all forms of consent surveillance involving law enforcement officers appears to be assured, completely unregulated police consent surveillance presents dangers which could [should] be reduced by external control." J. Carr, *The Law of Electronic Surveillance,* §305; Surveillance with the consent of a party to the conversation, Clark Boardman Co. (1977). It is this unregulated consent surveillance, like that present in this case, which the Ohio State Constitution, Art. I, §14, protects its citizens against.

The facts of the case sub judice demonstrate that no regulation was interposed between the police and its informant and the unknowing suspect. Nowhere in the record does the scope of the telephone conversation appear.

The record does not demonstrate that any restraint was placed on the informant's power to gather words. In effect, the police allowed a fishing expedition (see *U.S. v. Abramowitz*, 339 U.S. 56),[4] exactly that against which the warrant requirements of specificity were enacted. "It is a cardinal rule that, in seizing goods and articles [or oral communications per Katz] law enforcement agents must secure and use search warrants wherever reasonably practicable * * *" *Trupiano v. United States* (1948), 334 U.S. 699, 705. "Searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment." *Katz, supra*, at 356-57. Art. I §14 of the Constitution of the state of Ohio requires that search warrants be issued only "upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person and things to be seized." The United States Supreme Court has interpreted the issuance of warrants to require three things. First, warrants must be issued by neutral, disinterested magistrates. See e.g., *Connolly v. Georgia* (1977), 419 U.S. 245. Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that the evidence sought will aid in a particular apprehension or conviction, for a particular offense. *Warden v. Hayden* (1967), 387 U.S. 294, 307. Finally, warrants must particularly describe the things to be seized as well as the place to be searched. *Stanford v. Texas* (1965), 379 U.S. 476, 483.

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4. In *Rabinowitz*, the U. S. Supreme Court said

"Searches incident to arrest, we held, must be confined to a locus no greater than necessary to prevent injury to the arresting officer of distinction of evidence."

The court expressed a concern by the breadth of searches which frequently proved to be invitations to hunting expeditions.

The warrant requirement is subject to a few specifically established and well delineated exceptions,[5] none of which are applicable to the case at bar. From the record below, it is clear from the testimony of Sgt. Baumgartner that only after Thom (whom Baumgartner did not believe or thought lacked credibility) insisted he could get a statement from defendant-appellant, was the tapped and taped phone call made. Time was not of the essence and exigent circumstances did not exist which would have brought the exceptions to the warrantless conduct into play. Consent, no matter how voluntary, does not obviate the reasonableness requirement of the search and seizure. To allow the scope of the search to go undefined merely because one party to the conversation consents, is to go outside the judicial process and foreclose the interjection of a detached and neutral magistrate between the state and its citizens. "Though the police are honest and their aims worthy, history shows they are not appropriate guardians of the privacy which the Fourth Amendment [and Art. I §14 of the Ohio State Constitution] protects." *Jones v. United States* (1960), 362 U.S. 257, 273.

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5. The delineated exceptions are as follows:

(a) *Carroll v. United States* - 267 U.S. 132 Makes exception to where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

(b) *McDonald v. United States* - 335 U.S. 451 Makes exception to the warrant requirement under exigent circumstances.

(c) *Brinegar v. United States* - 338 U.S. 160 Makes exception to the warrant requirement where probable cause exists that a crime is being committed.

(d) *Cooper v. United States* - 386 U.S. 58 Makes exception to the warrant requirement where the goods seized are seized incident to a lawful arrest.

(e) *Warden v. Hayden* - 387 U.S. 294 Explains against exigent circumstances.

Under the circumstances of this case and in most consent surveillance cases, the Art. I §14 rights of the citizens must be protected by the acquisition of a search warrant prior to the seizure of oral communications. Because searches [and seizures] outside the judicial process, without prior approval by judge or magistrate are per se unreasonable * * *" *Katz, supra,* at 356-57.

This decision in no way hampers the ability of law enforcement officials to diligently carry out their duties. Crim. R. 41(D) guides the officers' conduct in the execution of the warrant and return with the inventory of seized property. After the seizure of the phone conversation in this case, the warrant could have been executed upon defendant Geraldo, for nowhere in the rules does the warrant have to be executed prior to the seizure. In fact, the rule specifically states that if the person was not present, the warrant could be left at the premises from which the property was taken.[6] This warrant requirement not

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6. The Ohio Rules of Criminal Procedure, Rule 41(D) states that:

> "(D) Execution and return with inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken, or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer."

The Federal Rules of Criminal Procedure, Rule 41 tracts this language almost exactly. In *Katz v. United States,* 389 U.S. 347, 356-57 at n. 16 Justice Stewart suggests:

(Continued on following page)

only protects the police in the lawful execution of their duties by interjecting a neutral magistrate between themselves and the target of the seizure, but it guarantees the suspect his Art. I §14 rights to be secure in his person from unreasonable search and seizure through governmental intrusion.

The question of consent warrantless searches vis-a-vis warrantless consent surveillance has been in a constant state of flux in the state and federal courts for some period of time. A lodestar case for any wiretap was *U.S. v. Katz,* 389 U.S. 347. Katz was decided in 1967. Prior to *Katz,* the supreme court, in *Berger v. New York,* 388 U.S. 41, held that wiretapping is a search and seizure within the meaning of the Fourth Amendment and, therefore, must meet its requirements, viz., there must be a prior showing of probable cause, the warrant authorizing the wiretap must particularly describe "the place to be searched, and the persons or things to be seized," and that it may not have the breadth, generality, and long life of the general warrant against which this amendment was aimed.

In *Katz v. United States, supra,* the supreme court held that an electronic device used without trespass onto any given enclosure (there a telephone booth), was a search for which a Fourth Amendment warrant was needed. Mr. Justice Stewart, speaking for the court, said: "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."

Footnote continued—

"Nor do the Federal Rules of Criminal Procedure impose an inflexible requirement of prior notice. Rule 41(D) does require federal officers to serve upon the person seached a copy of the warrant and a receipt describing the material obtained, but it does not invariably require that this be done before the search takes place." *Nordelli v. United States,* 24 F. 2d 665, 666-667.

Thus *Katz v. United States* finally swept away doctrines that electronic eavesdropping is permissible under the Fourth Amendment unless physical invasion of a constitutionally protected area produced the challenged evidence. In that case government agents, without petitioner's consent or knowledge, attached a listening device to the outside of a public telephone booth and recorded the defendant's end of his telephone conversation. In declaring the recordings inadmissible in evidence in the absence of a warrant authorizing the surveillance, the court overruled the *Omstead* (277 U.S. 438) and *Goldman* (316 U.S. 129) cases and held that the absence of physical intrusion into the telephone booth did not justify using electronic devices in listening to and recording Katz's words, thereby violating the privacy on which he justifiably relied while using the telephone in those circumstances.

The next case decided by the United States Supreme Court from which some direction in this area may be gained was *United States v. White*, 401 U.S. 745. The case was decided on April 5, 1971. The facts in that case were that during the course of a narcotics prosecution in the United States District Court for the Northern District of Illinois, the trial court overruled the accused's objections to testimony by government agents regarding conversations in 1965 and 1966 between the accused and an informant which the agents overheard by monitoring the frequency of a radio transmitter concealed on the informant's person. The prosecution was unable to locate and produce the informant at the trial. (It is to be noted that the same situation existed in *Hoffa v. United States*, 385 U.S. 293, which was left undisturbed by *Katz*, and which held that however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly

communicating with the authorities. In these circumstances, "no interest legitimately protected by the Fourth Amendment is involved," for that amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.") Significantly, in *Hoffa*, as in *White*, the government was unable to produce for trial the informant. The United States Court of Appeals for the Seventh Circuit reversed the convictions, on the ground that the evidence was inadmissible under the holding in *Katz v. United States, supra*, and that the Fourth Amendment makes inadmissible the recordings of conversations made by government agents by means of a listening device attached to the outside of a public telephone booth.

On certiorari, the United States Supreme Court reversed. They did so in a plurality opinion. Five members of the court, although not agreeing on an opinion, agreed that the *Katz* decision was improperly given retroactive effect.

In announcing the judgment of the court in the *White* case, Justice White, in an opinion joined by Burger, Ch. J., Stewart, J., and Blackmun, J., expressed the view that (1) police eavesdropping on conversations between an accused and an informant by means of a radio transmitter concealed on the informant's person does not violate the Fourth Amendment any more than does an informant's reporting on or secretly recording the conversations, neither of which is an unlawful search and seizure; (2) no different result should have been obtained by reason of the informant's disappearance and unavailability at trial; and (3) the *Katz* decision applies only to electronic surveillances occurring subsequent to its date, December 18, 1967.

Justice Blackmun concurred on the ground that eavesdropping carried on by electronic means does not constitute a "search" or "seizure" within the meaning of the Fourth Amendment. (Thus he would have reversed the *Katz* rationale.)

Justice Brennan, concurring in the result, agreed that the *Katz* decision was improperly given retroactive effect, but stated that the Fourth Amendment interposes a warrant requirement, both where an informant secretly records his conversation with an accused and where he secretly transmits them to the police by means of an electronic monitoring device.

Justice Douglas dissented on the ground that an electronic surveillance violates the Fourth Amendment, whether by a recording device or radio transmitter concealed on the informant's person, and that the *Katz* decision should be given retroactive effect.

Justice Harlan, dissenting, seriously questioned whether an informant secretly recording his conversation with an accused comports with the Fourth Amendent, and declared that third-party electronic monitoring violates the Fourth Amendment and that the *Katz* decision should be applied retroactively.

Justice Marshall dissented on the ground that electronic surveillance violates the Fourth Amendment and that the *Katz* decision should be applied retroactively.

Headnote one in *United States v. White* as set forth in 401 U.S. 745, 28 L. Ed. 2d 453 is as follows:

> "The decision in *Katz v. United States*, 389 U.S. 347, overruling the 'physical penetration' and 'trespass' test for search and seizure enunciated in earlier decisions of the United States Supreme Court, and ruling that electronic eavesdropping complies with the standard

of the Fourth Amendment only 'when authorized by a neutral magistrate upon a showing of probable cause and under precise limits and appropriate safeguards, and that the fruits of such a surveillance conducted without judicial authorization are inadmissible in evidence in a criminal trial, is to be given wholly prospective application and is to be applied only to cases in which the prosecution seeks to introduce the fruits of the electronic surveillance conducted after December 18, 1967, the date of the *Katz* decision."

Headnote two in *United States v. White,* 401 U.S. 745, 28 L. Ed. 2d 453, is as follows:

"No search and seizure warrant is required when a defendant voluntarily confides his wrongdoing to an apparent colleague who is in fact a government agent regularly communicating with the authorities, or when the government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from him, or when the same agent secretly carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence."

It is to be noted that the paragraph, *supra,* is taken from a separate opinion by only four Justices, although Justice Blackmun concurred on the ground that eavesdropping carried on by electronic means does not constitute a "search or seizure" within the meaning of the Fourth Amendment.

White, supra, was heard by an eight-member court.

Thus it can be seen that while five members of the court, although not agreeing on an opinion, agreed only that the *Katz* decision was properly given retroactive effect.

An analysis of the decision leaves me to the conclusion that the hinge pin of the case turned on whether or not *Katz* was to be given retroactive effect. As to the admissibility of warrantless tape recordings, four justices held they should be admissible, and four justices held this type of evidence to be violative of the Fourth Amendment. I am led to the conclusion that, with all due respect, the *White* case, in its final analysis, was improperly decided, and leaves us with the lodestar cases of *Berger* and *Katz,* which require a warrant prior to police interception, as the trial court found in the case sub judice, of the taping of a telephone conversation between an informant and an accused.

In *White, supra,* Mr. Justice Brennan, concurring in the result, noted that it was his view that current Fourth Amendment jurisprudence interposes a warrant requirement, not only in cases of third-party electronic monitoring, but also in cases of electronic recording by a government agent of a face-to-face conversation with a criminal suspect.

Mr. Justice Douglas, in his dissenting opinion, noted that "the issue in this case (*White*) is clouded and concealed by the very discussion of it in legalistic terms. What the ancients knew as 'eavesdropping' we now call 'electronic surveillance'; but to equate the two is to treat man's first gunpowder on the same level as the nuclear bomb". Mr. Justice Douglas felt that electronic surveillance is the greatest leveler of human privacy ever known. He questions how most forms of it can be held "reasonable" within the meaning of the Fourth Amendment. Further, he said, "to be sure, the Constitution and Bill of Rights are not to be read as covering only the technology known in the 18th century. Otherwise its concept of 'commerce' would be hopeless when it comes to the management of modern

affairs. At the same time the concepts of privacy which the Founders enshrined in the Fourth Amendment vanish completely when we slavishly allow an all powerful government, proclaiming law and order, efficiency, and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life around them and give them the health and strength to carry on. That is why a 'strict construction' of the Fourth Amendment is necessary if every man's liberty and privacy are to be constitutionally honored."

Mr. Justice Harlan, in his dissenting opinion, noted as follows:

> "We deal here with the constitutional validity of instantaneous third party electronic eavesdropping, conducted by federal law enforcement officers, without any prior judicial approval of the technique utilized, but with the consent and cooperation of a participant in the conversation, and where the substance of the matter electronically overheard is related in a federal criminal trial by those who eavesdropped as direct, not merely corroborative, evidence of the guilt of the nonconsenting party. The magnitude of the issue at hand is evidenced not simply by the obvious doctrinal difficulty of weighing such activity in the Fourth Amendment balance, but also, and more importantly, by the prevalence of police utilization of this technique."

Justice Harlan, further, in his dissent, notes that it is one thing to subject the average citizen to the risk that participants in a conversation with him will subsequently divulge its contents to another, but quite a different matter to foist upon him the risk that unknown third parties may be simultaneously listening in.

In the final analysis, Justice Harlan's dissent serves only to underscore the emerging operative assumption:

that the particular circumstances of each case will be scrutinized to the end of ascertaining the reasonableness of the search, and that will depend in large measure on whether prior judicial authorization, based on a particularized showing, has been obtained. Official investigatory action that impinges on privacy must typically, in order to be constitutionally permissible, be subjected to the warrant requirement.

Justice Harlan noted that in a number of cases the court had reiterated the importance of the prior independent determination of a neutral magistrate and underscored its centrality to the reasonableness requirement of the Fourth Amendment, and in the final analysis concluded that searches incident to arrest must be confined to a locus no greater than necessary to prevent injury to the arresting officer or destruction of evidence. Justice Harlan further notes that the abolition of the warrant requirement would not end electronic eavesdropping. It would prevent public officials from engaging in that practice unless they first had probable cause to suspect an individual of involvement in illegal activities and had tested their version of the facts before a detached judicial officer. The interest to be protected is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly and spontaneously without measuring his every word against the connotations it might carry when instantaneously heard by others unknown to him and unfamiliar with his situation or analyzed in a cold, formal record played days, months or years after the conversation. Intraposition of a warrant requirement is designed not to shield "wrongdoers", but to secure a measure of privacy and a sense of personal security throughout our society.

Justice Harlan further notes that the Fourth Amendment does, of course, leave room for the employment of

modern technology in criminal law enforcement, but in the stream of current developments in Fourth Amendment law he is of the opinion that it must be held that third party electronic monitoring, subject only to the self-restraint of law enforcement officials, has no place in our society.

Mr. Justice Marshall, in his dissenting opinion, says:

> "I am convinced that the correct view of the Fourth Amendment in the area of electronic surveillance is one that brings the safeguards of the warrant requirement to bear on the investigatory activity involved in this case. In short, I believe that *On Lee v. United States,* 343 U.S. 747, cannot be considered viable in light of the constitutional principles articulated in *Katz v. United States,* 389 U.S. 347, and other cases."

In a more recent case, *United States v. Hall,* et al., 488 F. 2d 193 (1973), the Ninth Circuit Court of Appeals reiterated the prevalent holding that use of electronic devices to overhear conversations is "search" within the Fourth Amendment. U.S.C.A. Const. Amend. 4. In that case, radio communication was intercepted by a housewife and she in turn notified the local law enforcement officers, who tuned in through the channels being used and recorded the conversation. The trial court admitted the conversation and the defendants appealed, asserting that the use of the conversation should have been suppressed. The Ninth Circuit Court reversed the trial court's ruling that the conversations could be admitted as evidence.

In noting the distinction between a radio communication and a telephone communication, the court noted that there is a reason for the more restrictive definition of oral communications, stating that when a person talks by telephone, he can reasonably assume privacy, but that that

assumption may often be invalid for nonwire communications. The court carefully reviewed the legislative history of Title III of the Crime Control Act and commented that electronic surveillance has come under close scrutiny by the courts, and properly so.

> "The ingenious mind of man can conjure up subtle methods of search through modern electronics as reprehensible as kicking down a door. While the Fourth Amendment offers protection from searches when unreasonable, it shuns absurd results. Every electronic surveillance is not constitutionally proscribed and whether the interception is to be suppressed must turn upon the facts of each case. It would be absurd to hold that one is constitutionally protected from any untoward results when he makes statements at a time when he has reason to know that some third party is or probably is, listening. We have, therefore, held that 'for suppression of overheard speech the speaker must have justifiably relied on his privacy.'" *United States v. Fisch*, (1973), 474 F. 2d 1071.

In the case sub judice, the defendant-appellee has presented uncontroverted evidence in the form of an affidavit that he relied on his privacy.

In interpreting the justifiable reliance language of *Katz*, the Ninth Circuit Court relied heavily on Mr. Justice Harlan's analysis:

> "As the concurring opinion of Mr. Justice Harlan makes clear, the concept of justifiable reliance involves both subjective and objective aspects. There must, first of all, have been a reliance on an actual and reasonable expectation of, privacy. But beyond the individual's expectations, the needs of society are involved. The individual's subjective, self centered expectation

> of privacy is not enough. We live in an organized society and the individual's expectation of privacy must be justifiable, one that society is prepared to recognize as reasonable."

The Ninth Circuit Court in *United States v. Hall, supra,* held that whether there was justifiable reliance is a factual question to be determined by the trial court. Thus, if a speaker has a justifiable expectation that his conversation is subject to interception and therefore is not an "oral communication" then the speaker has not justifiably relied on his privacy and the Fourth Amendment is no impediment to interception. In *Hall, supra,* the majority of the court ordered the case reversed and remanded for a determination of whether or not certain defendants could be found to have justifiably relied on their privacy. One judge, dissenting in part, after his analysis of the applicability to the Omnibus Crime Control and Safe Streets Act of 1968, concluded that under the facts in the case where the government conceded that the convictions of the defendant were possible only because of the intercepted communications, found that the divulgence of the communications to the officers of the Arizona Department of Public Safety and their divulgence by the officers at trial violated 47 U.S.C. §605, and would have reversed the convictions.

An analogy between the interception of telephone communications and the so called "beeper" cases is worthy of consideration. In a recent case decided by the United States Court of Appeals, Sixth District, No. 79-5092, entitled *United States of America, plaintiff-appellant v. Clark Bailey and Caroline Gomez, defendants-appellees,* decided and filed July 31, 1980, the court used as its starting point for a Fourth Amendment analysis *Katz v. United States, supra,* and noted that the government had persuaded the

Ninth Circuit that there was no violation because federal agents did not intrude physically into the telephone booth from which Katz made the calls. The Supreme Court rejected this trespass analysis, saying:

> "For the Fourth Amendment protects people not places. What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. See *Lewis v. United States*, 385 U.S. 206; *United States v. Lee*, 274 U.S. 559. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. 389 U.S. at 351."

The Sixth Circuit noted that the government's activities violated Katz's justifiable expectation of privacy, and the Supreme Court's holding that a warrantless eavesdropping was a search for Fourth Amendment purposes.

In its continuing analysis, the Sixth Circuit noted instances in which the Fourth Amendment challenge of an individual may fall short in certain situations. First, where he knowingly has exposed information to public scrutiny, the Fourth Amendment does not apply. Second, even where an individual has exhibited a subjective expectation that certain information will remain private, the Fourth Amendment will not apply unless society is prepared to recognize that expectation as legitimate. After a careful analysis of the "beeper" cases under the facts in the Bailey case, the court came to the conclusion that the rationale of the government's argument would authorize warrantless beeper surveillance of laboratory equipment, handguns, or any other legitimately owned item the government suspected would be used to commit a crime. The Fourth Amendment contains no such exception. If the government reasonably suspects noncontraband items will be used for criminal purposes presumably it can articulate

sufficient grounds to convince a neutral magistrate to issue a warrant authorizing beeper surveillance of these items. In answering the question before the court the court determined that beeper surveillance of noncontraband personal property in private areas trenches upon legitimate expectations of privacy and constitutes a search or seizure within the meaning of the Fourth Amendment.

The Sixth Circuit in *Bailey, supra,* noted that "traditionally the touchstone of Fourth Amendment analysis has been 'reasonableness.'" Precisely what is reasonable varies from case to case. The court was further of the opinion that electronic surveillance has such a potential for abuse that the government must be held accountable for its use.

In the *Bailey* case, *supra,* in a concurring opinion, Judge Keith, went beyond the holding of the majority. Citing *United States v. Holmes,* 521 F. 2d 859, and *United States v. Moore,* 562 F. 2d 106, Judge Keith came to the conclusion that as stated in *Moore, supra,* a driver properly can expect not to be carrying around an uninvited device that would continuously signal his presence.

Thus it would appear that the consensus of the federal circuit courts to date would require a warrant to be obtained prior to the installation of "beepers" on private automobiles even in public areas, where the accused has a reasonable expectation of privacy.

As noted in *Bailey, et al., supra,* electronic surveillance has such a potential for abuse the government must be held accountable for its use. To hold the exclusionary rule inapplicable under the facts in the case sub judice would place Fourth Amendment protections solely under the control of the executive department and would constitute judicial abdication.

I note an interesting inconsistency in each of the cases cited above and in the case sub judice with reference to wiretapping. In each case cited, the *accused made* a call which was tapped without a warrant or was recorded by means of an electronic device secreted on a government agent or informant who was engaged in face-to-face conversation wtih the accused, again without a warrant. Thus, for purposes of argument, and in light of R.C. 2933.58, it would appear to me that the person *placing* the call can be said to be giving up his right of privacy. R.C. 2933.58 specifically uses the word *parties*, and it's inconceivable to me that the person *receiving* the call can be said to, as a matter of law, be giving up *his* right of privacy. Thus, as I view the issue, the defendant-appellee had a subjective expectation of privacy in an area that the state has rendered private as a matter of state law and that the accused had a reasonable and legitimate expectation of privacy and is entitled to, under federal law, which I do not find in its present posture inconsistent, Fourth Amendment protection. Had the accused in the case sub judice *made* the call, the state's argument would be conceivably stronger.

I would find the appellant-state's first assignment of error not well taken as to branches 1, 2, 2A, but concur with the majority as to 2C. This court is not bound by the arguments in 2B.

The appellant's second assignment of error is that:

> "The trial court erred in suppressing all tesitmony concerning the contents of the May 24, 1978 conversations between appellee and Hugh Thom, the state's informant."

The appellant's second assignment of error is well taken. It was the seizure of words by means of tape recording that violated the appellee's constitutional right. Nothing in law

or logic should foreclose the informant from testifying from his independent recollection as to the contents of the conversations. As Justice Holmes stated in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, "Of course this does not mean that the facts thus obtained become sacred and inaccessible." I would affirm the suppression of the tape recorded conversation, not the knowledge of the informant derived therefrom. The informant could have testified about the alleged illegal transactions prior to their tape recording, so that there does not appear to be any logical prohibition to foreclose his testimony after their recording. Subject to cross examination, the informant's testimony should not be suppressed.

JUDGMENT ENTRY AND DECISION OF THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

(Dated October 18, 1979)

Case No. CR78-7059A

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

SAMUEL A. GERALDO, *et al.*,
Defendants.

JUDGMENT ENTRY AND DECISION RE:
MOTION TO SUPPRESS

This cause is before the Court upon defendant Samuel Geraldo's Motion to Suppress Evidence of Electronic Surveillance, and was submitted on the briefs and oral arguments of counsel. On consideration thereof, the Court finds that defendant's Motion is well taken and is hereby granted to the extent set forth herein.

The facts pertinent to the Motion before the Court are simple and uncontroverted. On or about May 24, 1978, defendant Samuel Geraldo received a telephone call from Hugh Thom. This telephone call was placed by Thom in the presence of Detective Sargeant Baumgartner of the Toledo Police Department. This telephone conversation was tape recorded by an audio pickup device attached to the earpiece of the telephone from which Thom called. It

is undisputed that Hugh Thom consented to the intercepting and recording of the telephone conversation and that a search warrant was not obtained prior to the recording.

The defendant, Samuel Geraldo, has moved to suppress the contents of the aforementioned telephone conversation on the grounds that the interception and recording thereof was an unreasonable search and seizure in violation of the Fourth Amendment of the United States Constitution.[1] Thus, defendant's Motion presents the Court with two distinct, albeit related, questions. The first is whether the recording of the Thom-Geraldo telephone conversation, without Geraldo's consent, constituted a search within the meaning of the Fourth Amendment. If this question is answered affirmatively, then the Court's inquiry must focus on whether the search comes within one of the exceptions to the warrant requirement of the Fourth Amendment.[2]

As Mr. Justice Blackman has recently noted, "[i]n determining whether a particular form of government-initiated electronic surveillance is a 'search' within the meaning of the Fourth Amendment, our lodestar is *Katz*

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1. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., Amend. IV. The Fourth Amendment has been made fully applicable to the States by the Fourteenth Amendment. See *Mapp v. Ohio*, 367 U.S. 743 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949).

2. It is axiomatic, that warrantless searches are *per se* unreasonable and that the fruits of such searches will be excluded from trial upon timely objection unless the warrantless search comes within one of the few "jealously and carefully drawn", *Jones v. U. S.*, 357 U.S. 493, 499 (1958), exceptions to the warrant requirement. *See generally Katz v. United States*, 389 U.S. 347, 356-357 (1967); *State v. Sanders*, 47 U.S.L.W. 4783, 4785 (June 20, 1979).

v. United States, 389 U.S. 347 (1967)." *Smith v. State*, 47 U.S.L.W. 4779 (June 20, 1979).[3] Under *Katz*, the applicability of the Fourth Amendment turns on "whether the person invoking its protection can claim a 'justifiable,' a 'reasonable', or a 'legitimate expectation of privacy' that has been invaded by government action." *Id.* at 4780. *Katz* and its progeny further establish that in determining whether an individual's expectation of privacy is protected by the Fourth Amendment, a bifurcated analysis is required. First, the Court must determine whether the individual has "exhibited an actual (subjective) expectation of privacy." *Katz, supra* at 361. Second, to invoke the guarantees of the Fourth Amendment, the Court must ascertain whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable' ". *Id. See also Smith, supra*, at 4778.

In the case at bar the State does not contest defendant's claim that he had an actual, subjective expectation of privacy when conversing with Hugh Thom on the telephone. Rather, the controversy here is whether the defendant's expectation was "legitimate" that is, "one that society is prepared to recognize as 'reasonable' ". *Katz, supra* at 361. As defendant concedes, neither the Fourth Amendment alone, nor federal statutory law lend legitimacy to the defendant's expectation of privacy. If the Court's inquiry were confined to analysis of only federal

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3. In *Katz, supra*, the Court discarded the traditional notion that a search could occur only where there had been an actual "physical invasion" of a "constitutionally protected area," 389 U.S. at 351-353, and held that the government's interception of telephone conversations by attaching an electronic audio pickup on the outside of a public telephone booth was a search within the meaning of the Fourth Amendment. Stating the obvious, that the Fourth Amendment "protects people, not places.", *id.*, the Court reasoned that the Fourth Amendment guarantees apply where the government has invaded an individual's "legitimate expectation of privacy."

law, constitutional or statutory, it is clear that defendant's motion would be ill-taken and denied.[4] However, it is equally clear that federal law is not the sole source from which an individual's expectation of privacy may be "legitimated"; rather, the Supreme Court has indicated

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4. In *U.S. v. White*, 401 U.S. 745 (1971) Justice White, writing for a plurality of the Justices, held that electronic monitoring of a face to face conversation with the consent of one of the participants did not constitute a search within the meaning of the Fourth Amendment and thus, a search warrant was not required prior to such monitoring. The *ratio decidendi* of Justice White's opinion was that the Fourth Amendment, in and of itself, does not legitimate an individual's subjective expectation of privacy where the invasion of that privacy interest is the result of a trusted colleague's disclosure to, or co-operation with, law enforcement officers. *Id.* at 752-753. As Justice White explained.

> "In these circumstances, 'no interest legitimately protected by the Fourth Amendment is involved,' for that amendment affords no protection to 'a wrongdoers misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it!"

Id. at 749, quoting *Hoffa v. U.S.*, 385 U.S. 293, 302 (1966).

Although Justice White's view did not command a majority of the Court in *White*, his view has prevailed in a majority of the federal circuits. For an exhaustive survey of these decisions, see *People v. Drielick*, 400 Mich. 559, 255 N.W.2d 619, at 622, n.11. Furthermore, for purposes of Fourth Amendment analysis, the federal appellate courts have not distinguished "between electronic monitoring of face-to-face conversations and of telephonic communications." *Drielick*, 255 N.W.2d at 622, 623, n.13.

Similarly, defendant cannot (and does not) rely upon Title III, Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 212, 18 U.S.C. Section 2510 et seq.) to legitimate his expectation of privacy. Under 18 U.S.C. Section 2511(1), it is a felony for anyone to intercept a telephone conversation. 18 U.S.C. Section 2511(2)(C), however, provides that the prohibition of Section 2511(1) shall not apply to ". . . a person acting under color of law . . . where such person is a party to the communication or one of the parties to the communication has given prior consent to such interpretation." Thus, under 18 U.S.C. Section 2510 *et seq.*, consensual telephonic interceptions are deemed lawful and accordingly, are admissible at trial. *See U.S. v. Santillo*, 507 F.2d 629 (3rd Cir. 1975), *cert. denied* 421 U.S. 968 (1975); *U.S. v. Rich*, 518 F.2d 980 (8th Cir. 1975), *cert. denied* 427 U.S. 907 (1976); *U.S. v. Edelson*, 581 F.2d 1290 (7th Cir. 1978).

that it is necessary to look to state law when analyzing the legitimacy of an individual's expectation of privacy.[5]

The issue, then, is whether an individual's expectation that the contents of a telephone conversation between that individual and another will not be electronically reproduced and preserved for posterity is one that Ohio law recognizes as legitimate or reasonable. Whether such an expectation of privacy is reasonable must be determined by an objective standard, i.e., that of the ordinary, prudent man. Accordingly, no single factor will be conclusive, rather, the reasonableness must be ascertained with a view to the totality of the circumstances.

In its brief, the State concedes that the Ohio Revised Code, Sections 2933.58[6] and 4931.28,[7] prohibits the inter-

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5. *U.S. v. White*, 401 U.S. at 748 n.1. Indeed, the Supreme Court has intimated that a privacy expectation may find its legitimacy in sources other than state statutory or case law. One such source would be the common understanding of the community. *See Rakas v. Illinois*, 99 S. Ct. 421, 730-431 [sic], n.12 (1979); *cf. Smith v. Maryland*, 47 U.S.L.W. 4779, 4780, n.5 (1979).

The court also notes that Ohio law, in the absence of the Fourth Amendment's mandates, would not require suppression of the contents of the Geraldo-Thom telephone conversation notwithstanding any illegality under state law. *See State v. Lindway*, 131 Ohio St. 166 (1936); *Cincinnati v. Alexander*, 54 Ohio St. 2d 248, 255 n.6 (1978). It is unquestioned, however, that the Fourth Amendment applies to the case *sub judice*, *see* n.1, ante, and that accordingly, resolution of the issues presented herein requires analysis of *both* federal and state law.

6. Section 2933.58, Ohio Revised Code, provides that:

(A) Except as provided in this section, or as permitted under the laws of the United States, no person shall willfully, surreptitiously, and by means of any device listen to, transmit, amplify, or record a private oral communication carried on in circumstances which reasonably indicate that the parties thereto desire it to be confined to them, and no person shall willfully disclose or willfully use or attempt to use any information, knowing or having reasonable cause to believe such information was obtained in violation of this section. Whoever violates this section shall be fined not more than one thousand dollars or imprisoned not less than one nor more than three years, or both.

(Continued on following page)

ception of a telephone conversation. (Memorandum in Opposition, p. 3) The State, however, contends that the Ohio Courts, in construing the above sections, have held that the prohibitions of Sections 2933.58 and 4931.28, R.C., do not apply to telephonic interceptions where one party to the conversation consents to the interception. In support of this proposition, the State cites the case of *Beaber v. Beaber*, 41 Ohio Misc. 95, 70 Ohio Op.2d 213, 322 N.E. 2d 910 (C.P. Family Ct. Div. Stark Cty. 1974).[8]

Beaber, however, is not similar to the instant case. In *Beaber* the telephonic interceptions at issue were the product of purely private action and were obtained without the consent of any of the participants. Since there was

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Footnote continued—

(B) This section does not apply to communications by or through a line, cable, or wire under the control of a telegraph or telephone company, or to communications in which at least one party thereto, in order to prevent a crime or bring an offender to justice, has consented in advance to such communications being listened to, transmitted, amplified, or recorded, or to communications carried on publicly or under circumstances in which the parties thereto might reasonably expect such communications to be listened to, transmitted, amplified, or recorded.

7. Section 4931.28, Ohio Revised Code, provides that:

No person shall willfully and maliciously cut, break, tap, or make connection with a telegraph or telephone wire or read or copy in an unauthorized manner, a telegraphic message or communication from or upon a telegraph or telephone line, wire, or cable, so cut or tapped, or make unauthorized use thereof, or willfully and maliciously prevent, obstruct, or delay the sending, conveyance, or delivery of an authorized telegraphic message or communication by or through a line, cable, or wire, under the control of a telegraph or telephone company.

8. It appears that *Beaber, supra*, is the only reported decision in Ohio construing both Section 2933.58 and Section 4931.28, R.C. *Beaber* involved a divorce action brought by the plaintiff-wife on grounds of gross neglect of duty and extreme cruelty. The defendant-husband cross-claimed for divorce on the same grounds. At trial, the court admitted into evidence, over plaintiff-wife's objection, certain tape recorded telephone conversations which defendant had obtained by tapping the telephone in the marital household.

no governmental action involved in *Beaber*, the holding in that case is devoid of any Fourth Amendment implications and thus has no probative value here. Moreover, the Court's *ratio decidendi* in *Beaber* is inapplicable to the case *sub judice*. The Court in *Beaber* admitted the tapes at issue on the grounds that an individual's right of privacy, vis a vis that person's spouse, is vitiated, or at least severely circumscribed, by force of the marital relationship. 41 Ohio Misc. at 102-103.[9]

In sum, it is difficult to reconcile the Court's decision in *Beaber, supra,* with the State's contention that the prohibitions set forth in Sections 2933.58 and 4931.28, R.C. are inapplicable where one party to a telephone conversation consents to the recording of the conversation. Similarly, there is nothing in the language of Section 4931.28, R.C. which suggests an exception, based on a participant's consent, to the prohibitions of Section 4931.28, R.C. It is also clear that in enacting Section 2933.58, R.C., the legislature intended that Section 4931.28, R.C. remain viable and controlling in matters relating to the interception of telephone conversation.[10]

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9. In so concluding, the Court in *Beaber* adopted the reasoning set forth in Judge Melvin's dissenting opinion in *Markham v. Markham*, 272 So. 2d 813 (Fla. S. Ct. 1973). 41 Ohio Misc. at 102. The import of *Beaber* is limited to the somewhat questionable proposition that there is an interspousal exception to the proscriptions set forth in Sections 2933.58 and 4931.28, R.C. The federal courts are in conflict as to whether such an interspousal exception may be implied under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. Section 2510 *et seq.*). *See* and *compare Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974), *cert. denied*, 419 U.S. 897 (1974), with *Kratz v. Kratz*, 48 U.S.L.W. 2173 (E.D. Pa. Aug. 23, 1979); *see also Remington v. Remington*, 393 F. Supp. 899 (E.D. Pa. 1975).

10. Section 4931.28, R.C., was not amended when Section 2933.58, R.C. was enacted by the legislature. To construe Section 2933.58, R.C., as authorizing telephone interceptions where one party has consented would abrogate, to a large extent, the mandate of Section 4931.28, R.C. Such a construction would be tantamount to a repeal by implication of Section 4931.28, R.C.,— a disfavored construction and one that the Court declines to accept.

The foregoing analysis of Ohio statutory law lends ample support to defendant's claim that the expectation of privacy asserted herein is legitimate and reasonable under Ohio law. This conclusion finds further support in the recognition by the Ohio Courts of a right of action, sounding in tort, for invasion of privacy.[11] The case law also recognizes that Section 4931.28, R.C., in effect, creates a zone of privacy surrounding telephone conversations and which will support an action in tort for the invasion of those privacy interests. *Lecrone v. Ohio Bell Telephone Co.*, 114 Ohio App. 299 (Ct. App. Franklin Cty. 1961), *quoted with approval* in *Lecrone v. Ohio Bell Telephone Co.*, 120 Ohio App. 129 (Ct. App. Franklin Cty. 1963).

In addition, Ohio Bell's General Exchange Tariff, Section 20 (Order No. 75-725-TP-ATA, eff. Feb. 27, 1976) prohibits the recording of any telephone conversation unless a "beeper" tone is sounded at 15 second intervals. Whether a public utility tariff is characterized as a legislative act, or an administrative regulation, or a contractual agreement, does not alter the obvious import of Section 20 of the General Exchange Tariff, *supra*. The mandate of that tariff is, basically, one of notice. That is, telephone users have a right to be notified that their telephone conversation is being recorded. Accordingly, upon such notice, a conversant may temper his words or even refuse to engage in conversation.[12]

In light of the foregoing, the Court finds that the privacy expectation asserted by the defendant is reasonable and legitimate under the law of Ohio. Therefore, it is the Court's opinion that the recording of the May 24, 1978

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11. *See Housh v. Perth*, 165 Ohio St. 35, 59 Ohio Op. 60, 133 N.E.2d 340 (1956).

12. The Court would also take notice that this tariff is embodied in the general telephone directory available to Ohio Bell's customers.

Thom-Geraldo telephone conversation was a search within the meaning of the Fourth Amendment of the United States Constitution. Thus, the question presented is whether the fruits of this search are admissible at trial or whether they must be excluded.

It is undisputed that a search warrant was not secured prior to the recording of the Thom-Geraldo telephone conversation. It is fundamental to Fourth Amendment jurisprudence that warrantless searches are *per se* unreasonable and that the fruits of such a search are inadmissible unless the search comes within one of "carefully delineated" exceptions to warrant requirement. *State v. Sanders,* 47 U.S.L.W. 4783, 4785 (June 20, 1979). Furthermore, the burden is upon the State to show that one of the exceptions to the warrant requirement is applicable. *U.S. v. Jeffers,* 342 U.S. 48, 51 (1951).

In the instant case, the State has failed to sustain its burden of proof. There is nothing in the record which would bring the search at issue within any of the exceptions to the Fourth Amendment's warrant requirement. Accordingly, the Court finds that the recording of the May 24, 1978 Geraldo-Thom telephone conversation constituted an unreasonable search and seizure in violation of the Fourth Amendment.

In light of the foregoing, the Court finds that defendant's Motion to Suppress is well taken and is granted to the extent consistent with this Court's order.

It is hereby Ordered that Detective Baumgartner and Hugh Thom shall not testify at trial as to the contents of the Thom-Geraldo telephone conversation which occurred on or about May 24, 1978. It is further Ordered that any and all tape recordings or other reproductions of that conversation shall not be admitted into evidence

at trial. This order, however, in no way precludes the introduction of the contents of the telephone conversation for purposes of impeaching the testimony of defendant Samuel Geraldo. See *Walder v. U. S.*, 347 U.S. 62 (1954); *Stone v. Powell*, 428 U.S. 465 (1976) *reh. denied*, 429 U.S. 874 (1976); *cf. State v. Butler*, 19 Ohio St. 2d 55, 48 Ohio Op. 2d 77 (1969).

/s/ GEORGE M. GLASSER
Judge

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Dated December 16, 1981)

No. 80-1677

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

THE STATE OF OHIO,
Appellee,

vs.

SAMUEL GERALDO,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR LUCAS COUNTY

This cause, here on appeal from the Court of Appeals for Lucas County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

Opposition

Supreme Court, U.S.
FILED
APR 15 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1690

In the Supreme Court of the United States

OCTOBER TERM, 1981

SAMUEL A. GERALDO, PETITIONER

vs.

STATE OF OHIO, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO RESPONDENT'S BRIEF IN OPPOSITION

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Now comes the Respondent, State of Ohio, by and through James D. Bates and Julia A. Reinberger, Assistant Prosecuting Attorneys of Lucas County, Ohio, and respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Supreme Court of Ohio.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE PETITIONER HAS FAILED TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

The Supreme Court of the United States, pursuant to 28 U.S.C. §1257 (3) has jurisdiction to review cases in state courts by way of certiorari in three situations: (1) where the validity of a Federal treaty or statute is drawn in question; (2) where the validity of a State statute is drawn in question on the ground of its being repugnant to Federal law; and (3) where a title, right, privilege, or immunity is set up or claimed "under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States".

It is fundamental to the jurisdiction of the Supreme Court pursuant to §1257 that there must be presented a substantial Federal question and that the question has been properly raised in the state court proceeding. The Federal question presented must be more than a formal one and must not be so devoid of merit as to be frivolous. Any Federal issue not meeting these standards is considered insubstantial and is cause for dismissal of an appeal or a denial of a petition for writ of certiorari. *Zucht v. King,* 260 U.S. 170 (1922); *Palmer Oil Corp. v. Amerada Corp.,* 343 U.S. 390 (1951).

The issues raised by the Petitioner fail to meet the requirement of a substantial Federal question. There is no new or novel constitutional question presented.

II. THE PETITION FOR CERTIORARI SHOULD BE DENIED FOR THERE IS AN ABSENCE OF A LEGAL CONTROVERSY.

The Supreme Court generally will not grant certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved. In *United States v. Johnson,* 268 U.S. 220, 227 (1924), the Court held, "We do not grant certiorari to review evidence and discuss specific facts". This policy has most often been followed in cases such as this one, where two separate appellate courts have concurred regarding the sufficiency of the facts. Further, as stated in *Graver Mfg. Co. v. Linde Co.,* 336 U.S. 271 (1948):

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.

Review will be accepted and facts re-examined only when a case acquires importance for some other reason. In light of the above, it is apparent that here there is an absence of a legal controversy of importance.

The concept of importance relates primarily to the importance of the issues "to the public as distinguished from importance to the particular party involved". *Rice v. Sioux City Cemetery,* 349 U.S. 70, 79 (1955). In the Petition presently before the Court, the issues are not sufficiently important to the public or to other persons who may be affected by the case to warrant granting certiorari to the United States Supreme Court.

III. THE PETITION FOR CERTIORARI SHOULD BE DENIED FOR THE FEDERAL QUESTION HAS BEEN PREVIOUSLY DECIDED.

The Supreme Court will generally not grant certiorari when the issue has been foreclosed by a prior decision of the Supreme Court. *Equitable Life Assurance Society v. Brown,* 187 U.S. 308 (1902). The Federal question is answered by Title III of the Omnibus Crime and Safe Streets Act of 1968 and more specifically, Section 2511(2)(c), Title 18, U.S. Code, which permits a police officer that intercepts a telephone conversation to testify to said conversation if one of the participants to the conversation consents to its interception.

The United States Supreme Court, in *United States v. White,* 401 U.S. 745 (1971), held that the Fourth Amendment did not protect the defendant who had conversations with the government informant. The Court held that the Defendant had no expectation of privacy which the law is prepared to accept as legitimate or reasonable. *White* was a plurality opinion by the Court, but has been followed by every federal circuit since the decision and was clarified in *United States v. Caceres,* 440 U.S. 741 (1979). In *Caceres, supra,* the Court affirmatively stated that neither federal statutes, nor the Constitution itself, prohibits a participant to a telephone conversation from recording same and using said recorded conversation in a criminal trial against a defendant. *Caceres,* at 454-5.

The rationale for the rule was summarized in *White, supra,* wherein the court stated:

> . . . . however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. In these circumstances, 'no intent legitimately protected by the Fourth Amendment is involved', for that amendment affords no protection to a 'wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it'. [citation omitted]. No warrant to 'search and seize' is required in such circumstances. *White,* at 749.

In the State court, the Petitioner claimed that the Federal question had been previously decided, but that the State courts could impose greater restrictions pursuant to the ruling in *Oregon v. Hess,* 420 U.S. 714, 719 (1974). Now the petition is attempting to claim some federal question. Because this Court has previously decided this issue, the Court should not grant certiorari.

CONCLUSION

For all of the reasons set forth above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

ANTHONY G. PIZZA,
PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By:

James D. Bates
Assistant Prosecuting Attorney

and

Julia A. Reinberger
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was sent via U.S. Mail this _____ day of March, 1982 to Richard S. Walinski, 900 Adams Street, Toledo, Ohio 43624; Robert Z. Kaplan, 840 Spitzer Bldg., Toledo, Ohio 43604; and Jon D. Richardson, 840 Spitzer Bldg., Toledo, Ohio 43604.

James D. Bates
Assistant Prosecuting Attorney

Julia A. Reinberger
Assistant Prosecuting Attorney